1. INTRODUCTION AND OVERVIEW

1.1. The Governor's Drug Enforcement, Education and Awareness Program.

On October 8, 1996, Governor Christine Todd Whitman announced a Drug Enforcement, Education and Awareness Program ("Governor's Program") spelling out a comprehensive plan for addressing the state's drug and alcohol problem. The Governor's Program responds decisively to recent surveys of New Jersey high school and middle school students that show that drug use by adolescents is on the rise. Much of the Governor's Program is dedicated to making schools a safe environment for children, where they can learn why and how to resist drugs, and where they can enjoy the full benefits of a thorough and efficient education that is guaranteed to all students by the New Jersey Constitution. Providing a safe and disciplined environment is essential. Every school should be free of drugs, alcohol, violence, and the unauthorized presence of firearms and other weapons.

The Governor's Program recognizes that one of the best ways to keep weapons, drugs, and alcohol out of our schools and away from children is to make clear that school officials will keep a watchful eye and will intervene decisively at the first sign of trouble. The Governor instructed the Attorney General to develop a comprehensive school search manual that would outline the law and policies concerning searches and seizures conducted by school officials or by law enforcement authorities working in conjunction with schools. The Governor directed that this plain-language school search manual cover a broad range of topics, including the constitutional use of drug detector canines and random locker inspection programs. The Governor further directed that the manual stress the need for all school staff members to be vigilant to the telltale indications of illicit drugs and dangerous weapons, and to take appropriate, prompt, and lawful action where there is reason to believe that illicit drugs or dangerous weapons are present in a school.

1.2. Nature of the Problem.

The most recent drug and alcohol survey of New Jersey's high school students conducted by the Division of Criminal Justice in cooperation with the Department of Education revealed that in 1995, 14% of all students surveyed reported that they had used an illicit drug *during school hours*. This figure represents a significant increase over the 10.4% of students who reported using drugs during school hours in 1992. Even more disturbing, of those students who had ever used marijuana or other illicit drugs, more than one out of four (27.4%) reported in 1995 that they had used an illegal substance during the school day.

The recent increase in drug use by adolescents is especially disturbing because, as noted recently by United States Supreme Court Justice Anton Scalia, school years are the time when the physical, psychological, and addictive effects of drugs are most severe. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386, 2395, 132 L.Ed 2d. 564, 580 (1995). Justice Scalia further noted that, "maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound"; "children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor." Id. quoting Hawley, *"The Bumpy Road to Drug-Free Schools,"* 72 Phi Delta Kappan 310, 314 (1990).

Aside from the tragic consequences from drug use visited upon individual users and addicts, the Court in Vernonia aptly noted that the effects of a drug-infested school are visited upon the entire student body and faculty, as the educational process is disrupted. Id. "The necessity for the state to act," the Court held, "is magnified by the fact that this evil is being visited ... upon children whom it has undertaken a special responsibility of care and direction." Id.

According to the most recent study conducted by the National Center on Addiction and Substance Abuse (CASA) at Columbia University, middle and high school students are more likely to encounter drug deals on school grounds than in their neighborhoods. The nationwide survey released by CASA in September 1997 found that 41% of the students surveyed said that they had seen drugs sold at their school. Only 25% reported seeing drugs sold in their neighborhood. More than three-quarters of the high school students said that a student had been expelled or suspended from school in the past year for using or selling drugs.

These statistics are deeply disturbing and demonstrate clearly that the modern drug problem strikes at the very heart of our system of education. As Justice Powell noted in his concurring opinion in New Jersey v. T.L.O., "[w]ithout first establishing discipline and maintaining order, teachers cannot begin to educate their students." 469 U.S. 325, 350, 105 S.Ct. 733, 747, 83 L.Ed.2d 720 (1985) (Powell, J., concurring).

In announcing her new drug program, Governor Whitman clearly echoed the concerns of the United States Supreme Court in its landmark decisions in New Jersey v. T.L.O. and Vernonia, and she issued a call to action, urging every school official and law enforcement agency to work together, as appropriate, to employ measures to address the substance abuse crisis. The problem, however, is certainly not limited to the sale and use of alcohol and illicit drugs. The Department of Education's system for monitoring incidents of violence, vandalism, and substance abuse revealed that between 1990 and 1994, the number of incidents reported annually tripled from 4,932 to 14,749. Two in

ten students (18%) reported that they had carried a weapon — a gun, knife, or club — in the past month. Nine percent of the students surveyed reported that they had carried a weapon *on school grounds* during the month preceding the survey, and one-third of those students reported that they had carried a weapon on school grounds six or more times in the month preceding the survey. Overall, 5% of New Jersey's high school students reported that they had carried a gun.

In light of these statistics, it is not surprising that many students report that they are not safe in school. Nine percent of the students surveyed said that they had been injured or threatened by someone with a weapon while on school property at least once during the past year. Five percent of the students surveyed said that they had not gone to school at least once in the past thirty days because they felt unsafe at or on the way to school.

On June 4, 1997, the Department of Education released a *"Report on Violence, Vandalism and Substance Abuse in New Jersey Schools"* for the 1995-1996 school year. This latest report shows that there were fewer incidents of vandalism and violence in public schools in the last year. While the most recent numbers reported by the Department of Education are encouraging and offer a reason to be hopeful, we cannot rest on our laurels.

Indeed, today more than at any time in our history, it is essential for school officials to pursue all lawful means to keep guns and other weapons, drugs, and alcohol off of school grounds. The need to keep order and to maintain a safe, well-disciplined school environment — one that is conducive to learning — must, however, be balanced against the rights that students enjoy under the State and Federal Constitutions to be free from unreasonable searches and seizures. The challenge, therefore, must be to achieve a delicate and appropriate balance: to protect the right of students to be safe and, at the same time, to respect their rights guaranteed under the Fourth Amendment of the United States Constitution and under Article I, Paragraph 7 of the New Jersey Constitution. These constitutional provisions impose significant limitations on the authority of police — and school officials — to conduct searches and to seize property, including weapons, drugs, and other contraband.

In balancing these rights and competing interests, school officials must never lose sight of the lesson that we hope to teach our students. As United States Supreme Court Justice Brennan (a New Jersey native and former Associate Justice of the New Jersey Supreme Court) once noted:

> We do not know what class petitioner was attending when the police and dogs burst in, but the lesson the school authorities taught her that day will undoubtedly make a greater impression than the one the teacher had hoped to convey ... Schools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedoms.
> [Doe v. Renfrow, 451 U.S. 1022, 1027-1028, 101 S.Ct. 3015, 3018-3019, 69 L.Ed.2d 395 (1981) (Brennan, J., dissenting from denial of certiorari.]

The message we send to schoolchildren must be clear and unambiguous: we will not tolerate drugs, alcohol, firearms, or other weapons on school property, and appropriate authorities will use all lawful means to detect, discipline and, where appropriate, punish those students who break the rules and who thereby endanger their classmates and teachers. The law governing searches and seizures provides more than enough flexibility for school officials and law enforcement officers to protect students from harm and to enforce school codes of conduct without running afoul of the Fourth Amendment and its state's constitutional counterpart. Indeed, the landmark United States Supreme Court decision — which upheld a search conducted in a New Jersey high school — expressly authorizes school authorities to conduct reasonable searches of students and their property. See New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). The Court's ruling provides school officials with an important tool with which to identify and discipline students who use, possess, or distribute drugs, alcohol, or weapons.

While most school officials and teachers serve a number of diverse roles, including disciplinarians, they are — first and foremost — professional educators. They should ***not*** be thought of as adjunct law enforcement officers. Nor should they be impressed into service as cops or prosecutors. However, given the number of students who report having used or purchased illicit drugs on school property and during school hours, and who feel unsafe in school hallways and on school grounds, it is important that all school administrators and teachers be fully apprised of the provisions and ramifications of the T.L.O. decision and more recent search and seizure cases. School officials must also be aware of their specific responsibilities to report promptly information concerning crimes committed on school grounds. It is incumbent upon the law enforcement community,

in turn, to work closely with education professionals to develop cooperative enforcement programs and to establish appropriate offense-reporting procedures, such as those spelled out in regulations promulgated by the State Board of Education and the Memorandum of Agreement Between Education and Law Enforcement Officials (1992). (See Chapter 14.)

1.3. Remedies to Redress Constitutional Violations.

A. The Exclusionary Rule. The United States Supreme Court in New Jersey v. T.L.O. concluded that the protection against unreasonable searches and seizures guaranteed by the Fourth Amendment to the United States Constitution does indeed apply to students while they are on school grounds. This conclusion can lead to certain collateral consequences that public school teachers and administrators should carefully consider before undertaking any search.

For one thing, evidence of a crime discovered during an improper search will be subject to the "exclusionary rule," which is a court-created doctrine that often requires the suppression of otherwise probative evidence. Under the exclusionary rule, reliable evidence of guilt or delinquency may be inadmissible at trial because of the manner in which the evidence was discovered. The exclusionary rule is meant to serve as a deterrent — a form of punishment — that is designed to provide a strong incentive for government officials to comply with the rules of arrest, search, and seizure.

In New Jersey v. T.L.O., the United States Supreme Court declined the New Jersey Attorney General's invitation to rule that the exclusionary remedy should not apply to evidence of a crime that was unlawfully seized by school officials. (Traditionally, this remedy applied only to searches conducted by police.) Because the United State Supreme Court ultimately ruled that the search conducted in that case by the assistant vice-principal was lawful, the Court saw no need to resolve the question. 105 S.Ct. at 738, n.3. However, the New Jersey Supreme Court in that very case had earlier ruled that the evidence was inadmissible in a juvenile delinquency proceeding, and so it seems clear, at least in New Jersey, that the exclusionary rule indeed applies to searches conducted by public school officials. Hence, a school official's unreasonable error in judgment can unwittingly interfere with the orderly administration of the criminal and juvenile justice systems — systems in which we *all* have a stake and a responsibility to support.

B. Civil Liability. The so-called "exclusionary rule" may not seem to be of much concern to school officials, especially since that particular remedy does not apply to school-based disciplinary proceedings, such as actions to suspend or expel a student

who has brought drugs, alcohol, or weapons on to school property. School administrators and teachers must recognize, however, that if they violate a student's constitutional rights, the school district and the individual school officials involved may be sued under a federal statute, 42 U.S.C. § 1983, that protects the civil rights (i.e., constitutional rights) of all citizens, including students. These cases are sometimes referred to as "1983" actions.

In most cases, public school officials and other government actors enjoy what is known as "good faith" immunity from liability. Administrators or teachers will not lose a lawsuit and will not be required to pay compensatory damages, even if they participate in an unlawful search, provided that they were acting in the good faith belief that their conduct was lawful.

This doctrine is sometimes also referred to as "qualified immunity." In Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the United States Supreme Court held that governmental officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly-established statutory or constitutional rights of which a reasonable person would have known. In Anderson v. Creighton, 483 U.S. 635, 639 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987), the Court further observed that the question whether an official can be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action, assessed in light of the legal rules that were "clearly established" at the time the action was undertaken. (Note that one of the critical objectives of this Manual is to consider and explain these "clearly established" legal rules and the constitutional and statutory rights enjoyed by students.)

The United States Supreme Court's qualified immunity doctrine attempts to strike a balance between two competing concerns: The necessity for constitutional damages actions against public officials because such actions may offer the only realistic avenue for vindication of constitutional guarantees, and the need to limit the costs to individuals in society created by litigation against public officials, including diversion of official energies from pressing public issues, deterrence of able citizens from acceptance of public office, and the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." See Jenkins by Hall v. Talladega City Bd. of Educ., 95 F.3d 1036, 1039 (11th Cir. 1996), quoting Harlow v. Fitzgerald, supra, 457 U.S. 800, 814, 102 S.Ct. 2727, 2736, 73 L.Ed.2d 396 (1982).

In Siegert v. Gilley, 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991), the United States Supreme Court outlined a two-step process for evaluating qualified

immunity claims: (1) was the law governing the public official's conduct clearly established, and (2) under the law, could a reasonable official have believed the conduct to be lawful. Other courts have remarked that individual defendants in a "1983" civil rights suit are immune from liability if reasonable public officials could differ on the lawfulness of their actions. See Blackwell v. Barton, 34 F.3d 298 (5th Cir. 1994). For a constitutional right to be "clearly established," however, there does *not* have to be a prior case directly on point, so long as the unlawfulness of the official's conduct is apparent in light of existing law. Anderson v. Creighton, supra, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523.

Hence, if a government official, including a school administrator or teacher, violates a clearly established legal rule, or, worse still, conducts a search *knowing* that the search is unlawful, the good faith immunity provision will not apply, and such violations may result not only in the award of compensatory damages, but also can result in the award of far greater "punitive" damages, which are designed to deter unlawful conduct.

Unfortunately, some officials, fearful of lawsuits and the risk of liability, mistakenly believe that the safest course of action is to do nothing, to ignore facts, for example, that provide a lawful basis to contact the police or to undertake a search under the authority granted to school officials by state statute and New Jersey v. T.L.O.. Teachers and administrators cannot afford, however, to be so concerned about civil liability that they begin to practice what could be called "defensive" education. In reality, it makes no sense for a school official to put his or her head in the sand. Under the law, a person can not only be sued for committing an unreasonable act (a so-called "commission"), but can also be held liable for failing to take action when a reasonable school official would have intervened. This type of breach of duty to act is called an "omission," and can result in civil liability and significant monetary awards.

The point is simply that school officials have a legal duty to keep their eyes open, to report suspicious circumstances to appropriate school and law enforcement authorities, and to conduct searches when those searches are necessary to keep students or other members of the school community from being injured. By way of example, a school coach who negligently fails to recognize that a student is using anabolic steroids, or who chooses to take no action on a reasonable suspicion that a student is using steroids, may subject himself or herself and the school district to significant liability if the steroid-abusing student is subsequently injured, or injures someone else on the playing field. See N.J.S.A. 18A:40A-12b.

Notably, state law expressly requires all persons, including school officials, to report suspected child abuse. See N.J.S.A. 9:6-8.10. The failure to make such a report

to appropriate law enforcement or child protection authorities constitutes a clear breach of a legal duty and, in fact, the failure to report suspected child abuse is punishable as a disorderly persons offense. N.J.S.A. 9:6-8.14. So too, school officials are required to report suspected substance abuse. N.J.S.A. 18A:40A-12.

In sum, the best way for government actors or employees to protect themselves from a lawsuit is simply to act reasonably, mindful of the duty to keep their eyes open and to protect students, as well as the duty to comply with the rules governing searches and seizures. Teachers and administrators should keep in mind that a person can only be held liable when a court or jury finds that he or she was behaving unreasonably. Complying with state laws, rules and regulations, and departmental policies and procedures, such as those spelled out in this Manual, offer strong if not compelling evidence that school officials were neither negligent nor unreasonable.

C. *School Officials as Role Models.* There is yet another compelling reason to motivate school officials to learn, understand, and comply with the requirements of the Fourth Amendment besides the need to avoid imposition of the exclusionary rule or civil liability. Perhaps most importantly, school officials must learn and respect the bounds of constitutional behavior if they are to remain faithful to their duties as teachers and role models. As Justice Stevens noted in his separate opinion in New Jersey v. T.L.O., "[s]chools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry." 469 U.S. 325, 373, 105 S.Ct. 733, 759 (Stevens, J., concurring in part and dissenting in part).

Our State and Federal Constitutions, and the Bill of Rights in particular, are not merely empty words to be memorized by rote from the pages of a social studies textbook. Rather, these charters set forth the basic tenets that define and limit the power of government in its dealings with private citizens. Our public schools often provide a young citizen with his or her first exposure to the practical workings of our Government and notions of authority and justice. Schools thus emerge as a particularly appropriate forum in which to demonstrate to our children how our system of Government is intended to work. Teachers or school officials who choose to ignore the requirements of the Constitution provide an unacceptable lesson and a poor example for the students in their charge.

This Policy Manual is intended to help school officials and teachers (and prosecutors and police officers as well) to find that delicate balance between the obligation to respect students' constitutional rights under the Fourth Amendment as against the duty to provide a school environment that is free of drugs, violence, and weapons.

1.4. Purpose and Approach of this Manual.

This Manual attempts to answer some of the most frequently asked questions about the law of search and seizure as it relates to students and school officials. At the outset, however, it must be recognized that it is not possible to address, much less to resolve, every legal issue that can or will arise. Even so, we hope in this document to give meaningful and practical advice to school officials and their law enforcement colleagues, and to do so in a format that is clear and easily understood. We have included abbreviated checklists that are designed to summarize major legal principles as succinctly as possible and to assist school officials, police officers, and prosecutors in quickly locating the applicable provisions of this Manual.

While voluminous and fairly detailed in its treatment of difficult legal issues, this Manual is not meant to be a scholarly treatise and, whenever possible, we have avoided the use of lengthy citations to legal authority and distracting footnotes that are often found in legal briefs and published court decisions that are written by and for lawyers and judges. Instead, this Manual is designed for use by *non*-lawyers. When more specific legal advice is needed, school officials are encouraged to contact their county prosecutor, who is expressly authorized by Attorney General Directive to render legal opinions and to resolve disputes. (See Chapter 14.5.) School officials are also strongly encouraged to seek the advice of the school board attorney or school district solicitor, especially with respect to "planned" searches or inspection programs.

This Manual provides guidance as to certain types of enforcement activities that are allowed under the New Jersey and Federal Constitutions. It also describes those investigative activities that are likely to be prohibited by the courts.

Under the Fourth Amendment, a search or seizure must not only be reasonable at its inception, but must be carried out in a reasonable manner. A certain type of search or inspection program can thus be either lawful or unlawful, depending upon the facts and the way in which the search was carried out. Consider, for example, that school officials and law enforcement agencies are allowed to work together to bring drug-detection dogs into a school to inspect lockers for the presence of illicit drugs. Such canine sweeps, however, must be done carefully and in accordance with certain definite rules, which are discussed in Chapter 4.5.

When it is possible to divine a clear set of rules from the caselaw, those rules are spelled out in the Manual. This Manual goes further in that it also sets out recommended procedures and preferred practices that are not necessarily based upon clear and binding legal precedent, but rather depend upon an interpretation or extrapolation of

generally accepted legal principles, or reflect commonly-held notions of reasonableness and fair play in communities across New Jersey. While some may not always agree with our advice, we caution that those who disregard these recommendations do so at their peril, especially if they choose to undertake a search in a manner that is expressly discouraged.

It is important to understand that the law governing the use of drug-detection dogs in schools, and many other types of so-called "suspicionless" searches, is unsettled and evolving. For this reason, there is ample room for reasonable people to disagree about what is allowed and what is prohibited. Surprisingly, there are very few published court decisions in New Jersey and the rest of the nation upon which we can confidently rely. Ostensibly, the dearth of published precedent is due to the fact that most school searches are conducted in a reasonable fashion, are not challenged in court, and thus offer no opportunity for a court to issue a landmark decision.

Given the paucity of published school search decisions, more often than not in trying to answer direct questions or to offer practical advice, there is no legal precedent directly on point. School officials and police officers (and the prosecutors and other lawyers who offer them legal advice) must therefore tread carefully through a sparse but thorny legal thicket. All too often, there are simply no "clearly established" rules to follow. (As noted above, the one benefit in this situation is that public officials will usually not be held civilly liable for their mistakes unless they are found to have violated a clearly established rule that a reasonable person would have been aware of. See Harlow v. Fitzgerald, supra, and Anderson v. Creighton, supra).

This point was underscored by an obviously exasperated court in Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991). The court, while trying to determine the reasonableness of a search conducted by school officials, lamented that:

> A diligent but unsuccessful search for additional guidance from the designated jurisdictional pool leads us to a troubling conclusion: the reasonableness standard articulated in New Jersey v. T.L.O. has left courts later confronted with the issue either reluctant or unable to define what type of official conduct would be subject to a 42 U.S.C. § 1983 [a federal "civil rights" law suit] cause of action.
> [936 F.2d at 886.]

The federal district court in DesRoches by DesRoches v. Caprio, 974 F.Supp. 542 (E.D. Va. 1997) was even more frank when it recently explained:

> This Court regrets that it cannot lay down a precise rule giving schools guidance about how many students may be searched in particular circumstances without running afoul of the Fourth Amendment. Such an opinion would be impermissibly advisory and inherently arbitrary, for the touchstone of Fourth Amendment analysis is "reasonableness," a standard which defies precise explication because it is wholly dependent upon the particular, unique facts of each case.
> [974 F.Supp. at 550.]

It is especially frustrating that the courts that do address school search issues in published opinions sometimes go off in decidedly different directions. This makes it that much more difficult to figure out what is permitted and what is prohibited, and to predict how the New Jersey Supreme Court would rule if it were to be presented with a certain set of facts.

When relying on cases that were decided in other jurisdictions, moreover, we must be especially mindful that the New Jersey Supreme Court has on a number of recent occasions construed Article I, Paragraph 7 of the State Constitution to provide citizens with greater protections than are afforded under the Fourth Amendment of the United States Constitution, as interpreted by the United States Supreme Court. The New Jersey Supreme Court has the final word under the State Constitution. As a result, police conduct that would be perfectly lawful if undertaken in other states has been held by the New Jersey Supreme Court to be unlawful. Even more curious, the search and seizure rules governing state, county, and municipal law enforcement agencies in New Jersey are, in some important respects, different (and stricter) than the rules governing federal law enforcement agencies operating in this state.

This so-called "divergence" between federal and New Jersey search and seizure law has led to the development of what is sometimes referred to as the "silver platter" doctrine. State and municipal police officers in New Jersey are generally not allowed to work closely with federal agencies and to have those federal agencies collect evidence for use in a state court prosecution by using techniques that are deemed by the United States Supreme Court to be lawful under the Fourth Amendment, but that are unlawful under Article I, Paragraph 7 of the State Constitution. State law enforcement officials, in other words, are not allowed to use certain information provided to them on a "silver platter" by federal law enforcement agencies, even though the federal agents were acting lawfully, by their standards, when they collected the evidence.

This rule, unique to New Jersey search and seizure jurisprudence, is designed to ensure that state law enforcement officials do not use their federal counterparts to

circumvent the stricter rules that have been developed by the New Jersey Supreme Court. Were this same doctrine to be applied in the context of school searches, it is conceivable that the New Jersey Supreme Court might rule that school officials cannot conduct a warrantless search based upon information provided to them by law enforcement agencies, even though the information, putting aside its source, would establish reasonable grounds to open a locker under the law that ordinarily would apply to searches conducted by school officials. (As will be discussed in Chapter 2.5, the rules governing searches by law enforcement officers are much more stringent than the rules governing searches conducted by school officials who are acting on their independent authority to maintain order and discipline.)

The issue, then, is whether and to what extent school officials and law enforcement officers in this state can work cooperatively in planning or conducting a search or seizure, and at what point will the New Jersey Supreme Court say that the stricter rules governing police searches and seizures apply, even though the act of searching was physically carried out by a school administrator or teacher.

Unfortunately, this is an unsettled area of law, and there seems to be no precedent directly on point. (For a more detailed discussion of the "silver platter" problem, see Chapter 4.5 D(4)(a).) We must, therefore, use our best judgment in trying to figure out what the law is in New Jersey. One thing is clear: We cannot rely uncritically on cases decided in other jurisdictions where the "silver platter" issue has never been developed because those states have harmonized their state and federal search and seizure law.

Even when the legal standards are well settled, reasonable people may still disagree about whether the facts in a given situation satisfy the applicable legal test. Most cases, and especially those involving search and seizure issues, are said to be "fact sensitive." Consider that in the T.L.O. case, the United States Supreme Court decided that the assistant vice-principal's search of the student's handbag was lawful, based on reasonable grounds to believe that the search would reveal evidence of an infraction of a school rule that prohibited students from possessing cigarettes on school grounds. The New Jersey Supreme Court, however, reviewing the very same facts, and using essentially the same legal standard, had earlier concluded that the search was *un*lawful because the assistant vice-principal had acted on unreliable information that did *not* establish reasonable grounds to believe that cigarettes would be discovered in the student's handbag. In this landmark decision, we see two different Supreme Courts reviewing the same record, but reaching opposite conclusions. (Interestingly enough, the United States Supreme Court offered an uncharacteristically candid rebuke to the New Jersey Supreme Court, commenting that the "New Jersey court's application of that [legal] standard reflects a somewhat crabbed notion of reasonableness." 105 S.Ct. at 744.)

It is not unusual, moreover, for an appellate court comprised of several members to be divided in search and seizure cases. In New Jersey v. T.L.O., three of the nine Justices of the United States Supreme Court disagreed with the majority holding, whereas at the state level, two of the seven Justices of the New Jersey Supreme Court dissented. The inability of judges and justices to agree on the lawfulness of a single search episode provides ample proof that the law of search and seizure is hardly an exact science. There are, however, steps that can be taken that will greatly increase the chances that school officials and police will prevail in any legal challenge, and those steps are spelled out in this Manual.

1.5. Basic Definitions.

A. Search. A "search" entails conduct by a government official that involves an intrusion into a student's protected privacy interests by, for example, examining items or places that are not out in the open and exposed to public view. This is usually accomplished by "peeking," "poking," or "prying" into a place or item shielded from public view or a closed opaque container, such as a locker, desk, purse/handbag, knapsack, backpack, briefcase, folder, book, or article of clothing. The act of opening a locker or bookbag to inspect its contents — however brief and cursory the intrusion — constitutes a search under the Fourth Amendment. For purposes of this Manual, the tactile examination or manipulation of an object, sometimes referred to in a law enforcement context as a "frisk" or "patdown," would also be a search if conducted by school officials. (Note that such conduct by police, if undertaken to reveal a concealed weapon, technically is not a full-blown search, but rather is subject to a lesser standard of judicial review than full probable cause. Since the standard governing a so-called "Terry frisk" by police is essentially the same as the legal standard used to determine the reasonableness of a full-blown search conducted by school officials, for purposes of this Manual, a frisk conducted by a school official, a form of "poking," is tantamount to a search.) The act of reading material in a book, journal, diary, letters, notes, or appointment calendar is also a search.

Note that an "inspection," a term often used in this Manual, is essentially the same as a search in terms of the Fourth Amendment if it involves peeking, poking, or prying into a private area or closed container. So too, ordering a student to empty his or her pockets or handbag constitutes a search within the meaning of this Manual. This is true even though the school official never physically touched the student's property, because if the student complies with the school official's request or command, objects that are not out in the open or already in plain view will be exposed to the school official's scrutiny, thus achieving the ultimate objective of a search. See United States v. DiGiacomo, 579 F.2d 1211, 1215 (10th Cir. 1978) ("an examination of the contents

of a person's pocket is clearly a search, whether the pocket is emptied by [a police] officer or by the person under the compulsion of the circumstances").

Merely watching students while they are in class or in school hallways does not intrude on any recognized privacy interest, and this form of surveillance does not constitute a search within the meaning of the Fourth Amendment. (See Chapter 9.) Similarly, the use of video cameras to monitor most places within a school building, such as hallways, does not constitute a search, provided that the monitoring equipment does not capture sound that might intercept or overhear a private conversation. (In that event, the monitoring would implicate the provisions of New Jersey's electronic surveillance law, which imposes significant limitations on the ability of government officials and even private citizens to intercept private conversations.) So too, the act of looking through the transparent windows of a parked automobile — if done *without* opening the door or reaching into the vehicle to move or manipulate its contents — is not a search for the purposes of this Manual.

B. Seizure. The term "seizure" is used to describe two distinct types of governmental action. A seizure occurs (1) when a government official interferes with an individual's freedom of movement (the seizure of a person), or (2) when a government official interferes with an individual's possessory interests in property (the seizure of an object).

In the law enforcement context, a seizure occurs under the first definition when a police officer orders a pedestrian or vehicle to "stop" or "pull over," when an officer makes a full-blown "arrest" or takes a juvenile "into custody," or when an officer begins to chase after a suspect under circumstances where the suspect would reasonably believe that he or she is not free to terminate the encounter with the pursuing police.

As a general proposition, the right of freedom of movement enjoyed by school-aged children is far more limited than the right of liberty enjoyed by adult citizens. Children between the ages of six and sixteen, after all, are required by law to attend school, see N.J.S.A. 18A:38-25, and minors are also subject to reasonable curfews imposed by local governments.

School officials can certainly compel students to attend particular classes and to be present at certain events or assemblies without in any way implicating the rights embodied in the Fourth Amendment. Students, of course, are subject to the daily routine of class attendance, and the times and locations for each class period are determined by school officials, not by students. See Doe v. Renfrow, 475 F. Supp. 1012, 1019 (N.D. Ind. 1979), aff'd in part, remanded in part, 631 F.2d 91 (7th Cir. 1980), cert. den. 451 U.S. 1022, 101 S.Ct. 3015, 59 L.Ed.2d 395 (1981) (district court flatly

rejected the claim that a scent dog operation constituted a "mass detention and deprivation of freedom of movement"; school officials maintain the discretion and authority for scheduling all student activities each day).

For this reason, the act of ordering a student to go to the principal's office, or to sit in a given room or "detention" hall, does not constitute an unreasonable "seizure" within the meaning of the Fourth Amendment or this Manual. Compare Wise v. Pea Ridge Sch. Dist., 855 F.2d 560 (8th Cir. 1988) (holding that in-school confinement to a small room did not violate a student's substantive due process rights) and Hayes Through Hayes v. Unified Sch. Dist., 669 F. Supp. 1519 (D. Kan. 1987), rev'd on other grounds, 877 F.2d 809 (10th Cir. 1989) (holding that it was not a violation of the Constitution for school authorities to order a disruptive student to sit in a small "time out" room). (Note that this citation does not constitute an endorsement by this Manual of "seclusionary time out" as a form of discipline.) See also Edwards for and in Behalf of Edwards v. Rees, 883 F.2d 882 (10th Cir. 1989) (holding that it was reasonable for a vice-principal to remove a student from class and conduct a twenty-minute interrogation in the vice-principal's office concerning the student's role in calling in a bomb threat based upon statements given by two other students implicating the interrogated student). But compare Rasmus v. Arizona, 939 F.Supp. 709 (D. Ariz. 1996) (unresolved issues of fact precludes summary judgment on Fourth Amendment claim that student was subject to an unreasonable seizure that was excessively intrusive in light of the student's age and emotional disability where the eighth grade student, who suffered from attention deficit disorder, was confined in a 3′ x 5′ time-out room that was equipped with double steel bolt locks and a peephole which allowed teachers to look into the room but prevented students from looking out).

It should be noted, however, that a student who is brought to a principal's office for questioning to be conducted by a police officer will almost certainly be deemed to be "in custody" for the purposes of the law concerning police interviews and interrogations. (See Chapter 6 for a more detailed discussion of the law governing interrogations.)

Schools may impose significant restrictions not only on students' freedom of movement, but also on their ability to use and possess personal property. School authorities may, for example, prohibit students from bringing on to school property objects or items that are not per se illegal were they to be carried by adults, such as personal stereos, cellular telephones, pagers, pocket knives, tobacco products, or any other object that might conceivably disrupt the educational environment. The United States Supreme Court in New Jersey v. T.L.O. made clear that schools can enforce rules "against conduct that would be perfectly permissible if undertaken by an adult." 469 U.S. at 339, 105 S.Ct. at 741.

Similarly, schools may regulate and impose significant restrictions on the *use* of student property that is allowed to be brought on school grounds. Schools may require students to keep and store certain items in designated areas during the school day. Schools authorities, for example, may prohibit students from carrying backpacks into a classroom and may require students to keep their backpacks stored safely in assigned lockers while school is in session.

C. Public Official. The terms "public official" or "government official" as used in this Manual refer to anyone who is employed by, or acting under the direction or authority of an employee of, the State of New Jersey or any of its political subdivisions, including any county, local, or regional school district. The Fourth Amendment protections against unreasonable searches and seizures apply only to the conduct undertaken by *governmental* officials, and do not apply to searches or seizures conducted by private citizens. Arguably, therefore, the Fourth Amendment and Article I, Paragraph 7 of the State Constitution do not apply to administrators, teachers, or other employees of independent, private or parochial schools. (Note, however, that the Legislature may enact a statute that imposes limits on the authority of *both* the public and private school employees, such as, for example, the law that prohibits the use of corporal punishment, N.J.S.A. 18A:6-1, or that requires any citizen to report suspected child abuse, N.J.S.A. 9:6-8.10. See discussion in Chapter 10.2 concerning whether the recently-enacted prohibition against strip searches applies to nonpublic school employees.)

Administrators of these independent, private or parochial schools may nonetheless want to follow the search and seizure rules and procedures recommended in this Manual, especially because these rules are premised on notions of "reasonableness," which is the foundation of all Fourth Amendment jurisprudence. Nonpublic schools, moreover, may want to impress upon their students the values and ideals of our constitutional democracy. In any event, if a private school administrator undertakes a search at the direction of or in conjunction with a law enforcement officer, the law enforcement officer's participation will make the search subject to the requirements of the Fourth Amendment.

D. School Official. The terms "school official" or "school authorities" as used in this Manual refer to any employee or agent of a county, local, or regional public school district, including, but not limited to, a school superintendent, principal, vice-principal or other administrator; teacher; substitute teacher; counsellor; athletic director or coach; teaching assistant; nurse; any other professional staff member whether certified or not; clerical employee; janitor or custodian; a school bus driver employed by the district; and any private security officer (other than a law enforcement officer) employed by a school district. Note that no distinction is drawn between administrators and

teachers. Note further that the term generally does not include employees of nonpublic schools. (See the immediately preceding definition of "public official.")

E. Law Enforcement Officer. The term "law enforcement officer" as used in this Manual means any sworn employee of any federal, state, bi-state, county, or municipal law enforcement or prosecuting agency who has police powers under the laws of New Jersey or the United States, without regard to whether the person is on or off-duty, or is working temporarily in the capacity of a private security officer. The term "law enforcement officer" includes, but is not limited to, State Police members; county or municipal police officers; Special I or Special II police officers; officers hired by school districts pursuant to N.J.S.A. 18A:6-4.2 et seq.; sheriff's officers; state investigators, county investigators or detectives; and assistant prosecutors or deputy or assistant attorneys general.

F. Individualized Search. The terms "individualized search" or "suspicion-based search" as used in this Manual refer to a search that is based on a suspicion that a particular, identified student has committed an offense or has violated school rules, and that evidence of the offense or infraction would be found in a specific location, such as the suspect student's handbag or knapsack or in the locker assigned to that particular student. An individualized search is distinct from a "sweep" or "suspicionless" search.

G. Suspicionless Search. The terms "sweep search," "suspicionless search," "generalized search," and "inspection program" as used in this Manual refer to searches of lockers or student possessions that are not limited to a single or specific location and that are not based upon a particularized suspicion that a specific, identified student has committed an offense or infraction of the school rules, or that evidence of any such offense or infraction would be found in a particular location associated with the student who is suspected of wrongdoing. Rather, a sweep search involves subjecting all or some number of lockers or other places to opening and inspection, pursuant to a neutral plan (e.g., by random selection), based upon a generalized belief that drugs, weapons, or other contraband are being routinely brought on to school property by an unspecified number of students whose exact identities are not known.

The terms "sweep search" or "suspicionless search" as used in this Manual also include the act of subjecting the exterior surface or air surrounding unopened lockers, or other objects containing student possessions, to examination by a drug or weapons detection canine, even though, technically, the examination by a scent dog of the outside of a locker or other container does not constitute a search under the Fourth Amendment, because the dog cannot reveal anything private about the contents of the locker or container. It should be noted, however, that once the drug-detection canine alerts to the

presence of controlled dangerous substances in a locker, the ensuing act of opening that locker in response to the animal's alert constitutes an "individualized" search as that term is used in this Manual. (See Chapter 4.5.)

A sweep search or suspicionless search is distinct from an individualized search, which is targeted to a specific individual suspected of wrongdoing and the property owned by or otherwise linked to the student who is suspected of a criminal offense or violation of the school rules.

H. Drugs. The terms "drugs," "illicit drugs," and "controlled dangerous substances" as used in this Manual shall have the same meaning as the term "controlled dangerous substance" as defined in N.J.S.A. 2C:35-2, and includes any drug, substance, or immediate precursor listed in Schedules I through V of the Schedules set forth in N.J.S.A. 24:21-5 through 24:21-5.8 as may be modified by the Commissioner of Health. The terms include, but are not limited to, anabolic steroids, marijuana, cocaine, "crack" cocaine, heroin, PCP ("angel's dust"), methamphetamine ("speed" or "ice"), ketamine ("Special K"), LSD, and mescaline.

I. Drug Paraphernalia. The term "drug paraphernalia" as used in this Manual shall have the same meaning as that term is defined in N.J.S.A. 2C:36-1. The term includes all equipment, products, and materials of any kind that are used or intended for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, ingesting, inhaling, or otherwise introducing into the human body a controlled dangerous substance.

J. Weapons. The terms "weapons," "deadly weapons," and "dangerous weapons" as used in this Manual shall have the same meaning as the term "weapon" as defined in N.J.S.A. 2C:39-1(r), and includes anything readily capable of lethal use or of inflicting serious bodily injury. The term includes, but is not limited to, all (1) firearms, even though not loaded or lacking a clip or other component to render them immediately operable; (2) components which can be readily assembled into a weapon; (3) gravity knives, switchblade knives, daggers, dirks, stilettos, or other dangerous knives, billies, blackjacks, bludgeons, metal knuckles, sandclubs, slingshots, cestui or similar leather bands studded with metal filings or razor blades imbedded in wood; and (4) stun guns; and any weapon or other device that projects, releases, or emits tear gas or any other substance, including, but not limited to, "mace" or "pepper spray," intended to produce temporary physical discomfort or permanent injury through being vaporized or otherwise dispensed in the air.

K. Firearm. The terms "firearm" or "gun" as used in this Manual shall have the same meaning as the term "firearm" as defined in N.J.S.A. 2C:39-1(f), and includes any handgun, rifle, shotgun, machine gun, automatic or semi-automatic rifle, assault weapon, or any gun, device or instrument in the nature of a weapon from which may be fired or ejected any solid projectile ball, slug, pellet, missile or bullet, or any gas, vapor or other noxious thing, by means of a cartridge or shell or by the action of an explosive or the igniting of flammable or explosive substances. It shall also include, without limitation, any firearm which is in the nature of an air gun, spring gun or pistol, or other weapon of a similar nature in which the propelling force is a spring, elastic band, carbon dioxide, compressed or other gas or vapor, air or compressed air, or is ignited by compressed air, and ejecting a bullet or missile smaller than three-eighths of an inch in diameter, with sufficient force to injure a person.